NO. 91-1657

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

Charlene **LEATHERMAN**, et al.,
Petitioners

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, et al.,
Respondents

On Writ Of Certiorari To
The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. On a complaint brought pursuant to 42 U.S.C. Section 1983 alleging liability against a local governmental entity for constitutional violations caused by its failure to adequately train and supervise its police officers, is dismissal of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure due to the complaint's failure to satisfy a "heightened pleading" requirement:

A) prohibited by the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure; or

B) prohibited by the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge or modify any substantive right?

LIST OF PARTIES

Petitioners from Judgment Below[1]

Charlene Leatherman and Kenneth Leatherman, Individually and as Next of Friend of Travis Leatherman; Gerald Andert; Kevin Lealos and Jerri Lealos, Individually and as Next of Friends of Travor Lealos and Shane Lealos; Pat Lealos; Donald Andert

Respondents

The Tarrant County Narcotics Intelligence and Coordination Unit; Tim Curry, in his Official Capacity as Director of the Tarrant County Narcotics and Coordination Unit of Tarrant County, Texas; Don Carpenter, in his official Capacity as Sheriff of Tarrant County, Texas; City of Lake Worth, Texas; City of Grapevine, Texas

[1]Lucy Andert, formerly a Plaintiff in the District Court, is deceased. The executors of Mrs. Andert's estate, through their counsel, have informed her counsel in this case that they do not desire to proceed with litigation of her claims herein.

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OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered February 28, 1992, and from which review is sought, are reported at 954 F.2d 1054 (5th Cir. 1992), and are attached in the Appendix to the Petition for Writ of Certiorari beginning at page 1a.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas entered January 22, 1991, and from which Petitioners appealed, are reported at 755 F.Supp. 726 (N.D. Tex. 1991), and are attached in the Appendix of the Petition for Writ of Certiorari beginning at page 25a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is sought on February 28, 1992. The Petition for Writ of Certiorari was filed on April 16, 1992, and granted on June 22, 1992. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

This case arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, and the Questions presented involve another statute, the Rules Enabling Act, 28 U.S.C. Section 2072, and Rule 8 of the Federal Rules of Civil Procedure. These statutes and rule are reprinted in the Appendix to the Petition for Writ of Certiorari at pages 55a-56a.

STATEMENT OF THE CASE

This case arises out of two separate searches of private residential dwellings conducted by law enforcement officers in Tarrant County, Texas, on January 30, and May 30, 1989. The Petitioners herein alleged in their First Amended Complaint, inter alia, that the searches in question were carried out in an unconstitutional manner in violation of the Fourth Amendment, and that the Respondent local governmental entities, through their respective failures to adequately train and supervise their police personnel, are liable to Petitioners under 42 U.S.C. Section 1983.

(i) STATEMENT OF THE FACTS[2]

At approximately 8 o'clock p.m. on January 30, 1989, Petitioner Gerald Andert and his family were gathered at Gerald's home located in the 2000 block of Kimball Road in the City of Southlake, Texas, mourning the tragic death of Marie Andert, Gerald's wife and the matriarch of the Andert family, who had died two days

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[2]Petitioners' statement of facts is a virtually verbatim restatement of factual allegations contained in their First Amended Complaint. See Joint Appendix, pages 32-36.

earlier after a three-year battle with cancer. Present at the residence were Petitioners Kevin and Jerri Lealos (Gerald's son-in-law and daughter, respectively, who also lived at the residence, hereinafter referred to as the "Andert" residence); Shane and Travor Lealos (respectively the daughter and son of Kevin and Jerri Lealos); Petitioner Pat Lealos (Kevin's sister who had flown in from El Paso, Texas, for the funeral); Petitioner Donald Andert (Gerald Andert's son); and Lucy Andert (Gerald's 76 year old sister-in-law).

Moments after 8 o'clock on the evening in question, and completely without prior warning, numerous law enforcement officers of the Defendant City of Grapevine and Defendant TCNICU broke into the Andert home. Upon hearing the French doors of the house breaking open, Gerald Andert, who at the time was seated in the kitchen area of his home looking at photographs of his late wife, turned to determine what was going on. As Gerald turned around, an unidentified officer knocked him backwards, breaking the back of the wooden chair in which he was sitting. Upon turning back toward the officer and raising his arms to deflect another blow, Gerald was without

provocation clubbed twice on the head by the officer, causing a severe cut to Gerald's forehead which would later require 11 stitches to close.

During the extended period of time during which Gerald Andert and members of his family were required to lie face down on the floor, held at gunpoint, fearing for their lives and still unaware of the identity of these armed intruders, several requests for identification were made of the law enforcement officers present. The officers responded to these requests for identification by shouting obscenities and threats at the persons requesting such information. Upon the conclusion of their search of the Andert residence some 1 1/2 hours later, and having discovered no items which could form the basis of a criminal prosecution, the officers left the premises without so much as an apology for their wrongful search of the Andert residence, or the grossly abusive manner in which the search was carried out.

The second search in question occurred on May 20, 1989. On that date Petitioner Charlene Leatherman and her son, Travis Leatherman were stopped in the 8200 block of Cahoba Road in Fort Worth, Tarrant County, Texas, by law enforcement officers in a marked

police car. Immediately after Charlene brought her vehicle to a stop, she was surrounded by several men, later discovered to be plain clothes police officers, who were armed with hand guns and other weapons. The plain clothes police officers shouted a variety of instructions to Charlene and Travis and threatened to shoot each of them. The plain clothes police officers proceeded to identify Charlene and Travis, and moments latter informed them that law enforcement officers executing a warrant had shot to death two dogs belonging to the Leathermans and were in the process of conducting a search of the Leatherman residence. When Charlene inquired of the officer apparently in charge of the search as to why the family dogs had been shot, the officer replied that this was "standard procedure." The search of the Leatherman's home was planned and carried out by law enforcement officers employed by or under the control of TCNICU, Tarrant County and the City of Lake Worth.

On returning to their residence, Charlene and Travis Leatherman discovered "Shakespeare," the smaller of the two family dogs owned by the Leathermans, lying shot to death approximately 25 feet from the main

doorway entrance to their home. Shakespeare appeared to have been shot three times: once in the stomach, once in the leg, and once in the head. Upon entering the doorway of the residence, it appeared that "Ninja," the larger of the two dogs owned by the Leathermans, had defecated just inside the door of the residence. Ninja was subsequently discovered on top of a bed located in a rear bedroom of the house. Ninja had been shot in the head at close range, apparently with a shotgun, which resulted in brain matter being splattered across the bed, against the wall, and on the floor around the bed.

Upon the conclusion of the search of the Leatherman residence, and having discovered no items described in the warrant which could otherwise have provided a basis for a criminal prosecution, the officers verbally acknowledged to Charlene and Travis their "mistake" in having searched the Leatherman residence. Instead of leaving at this time however, the officers removed lawn chairs from a truck in which they had arrived and proceeded to lounge about the driveway and yard of the Leatherman residence for approximately 1 1/2 hours, drinking beer, smoking, talking, laughing, and essentially

having a party to celebrate their seemingly unbridled governmental power.

(ii) COURSE OF PROCEEDINGS

On November 22, 1989, Petitioners Charlene and Kenneth Leatherman, individually and in their capacities as Next Friends of their son, Travis Leatherman (the "Leatherman" Plaintiffs), filed suit in the 96th Judicial District Court of Tarrant County, Texas, against Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU") and Tarrant County, Texas, alleging Respondents TCNICU and Tarrant County were liable for their damages arising out of the illegal entry and search of their residence on May 20, 1989. The Leatherman plaintiffs brought their claims under both 42 U.S.C. Section 1983 and State law.

On December 12, 1989 Respondents TCNICU and Tarrant County petitioned the United States District Court for the Northern District of Texas to remove the Leatherman plaintiffs' claims to federal court. (R.I,1). Eight days later, on December 20, 1989, Respondents TCNICU and Tarrant County filed their answer to the Leatherman plaintiffs' petition (which had originally been filed in state court), and contemporaneously filed

a fifty page "Motion to Dismiss or for Summary Judgment" and supporting memorandum of law. On February 1, 1990, the District Court entered an order dismissing the Leatherman plaintiffs' claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that the plaintiffs' state court petition for relief "fail[ed] to allege any custom [,] practice or usage from which a policy may be inferred." (R.I,70).

On February 8, 1990, the Leatherman plaintiffs, after retaining additional counsel, filed in the District Court a motion to vacate the District Court's February 1, 1990 order dismissing their complaint. The Leatherman plaintiffs also sought leave of the Court to amend their pleadings. (R.I,71). On March 8, 1990, the District Court granted the Leatherman plaintiffs' motion to vacate its February 1, 1990 order of dismissal, and granted them leave to amend their complaint within 20 days. (R.I,88).

On March 23, 1990, Petitioners Charlene and Kenneth Leatherman timely filed their First Amended Complaint in accordance with the District Court's order. The Leatherman plaintiffs named as defendants both TCNICU and Tarrant County, Texas, who had been

defendants in the plaintiffs' original complaint, as well as an additional defendant, the City of Lake Worth, Texas, whom plaintiffs had determined was also involved in the search of their residence on May 20, 1989.[3] Pursuant to Rule 20(a) of the Federal Rules of Civil Procedure, and based on their interpretation of the "transaction and common question requirements" of Rule 20(a), the Leatherman plaintiffs also joined as additional plaintiffs Petitioners Gerald Andert; Kevin and Jerri Lealos, individually and as next friends of Shane and Travor Lealos; Pat Lealos; Donald Andert and Lucy Andert (the "Andert" plaintiffs). The Lealos plaintiffs' claims against Respondents TCNICU and Tarrant County were based on the illegal search of the Andert residence on January 30, 1989, and named as an additional defendant the Respondent City of Grapevine, Texas.

After all Respondents had filed their answers to Petitioners' First Amended Complaint, Respondents

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[3]The amended complaint also named two individuals, Curry and Carpenter, in their official capacities. As no personal liability was alleged against Curry or Carpenter, the only real parties in interest here are the Respondent governmental entities.

TCNICU and Tarrant County on April 17, 1990, filed their second "Motion to Dismiss or for Summary Judgment." On June 7, 1990, Respondents TCNICU and Tarrant County filed a motion for a protective order seeking to insulate them from discovery sought by Petitioners in their "Amended Request for Production of Documents." (R.II,249). On June 18, 1990, Petitioners filed their response to Respondents TCNICU and Tarrant County's Motion to Dismiss or for Summary Judgment, and expressly requested therein that the District Court defer consideration of the Respondents' motion for summary judgment, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, on the ground that the discovery sought by Petitioners in their Amended Request for Production of Documents, to which the Respondents objected, would provide facts essential to their opposition to Respondents' motion for summary judgment. (R.II,362,390-391). On July 20, 1990, Petitioners filed a motion for a hearing on Respondents TCNICU and Tarrant County's Motion for Protective Order, and requested therein that the District Court set an early

date for the hearing on Respondents' motion for protective order.

On December 31, 1990, the District Court granted Respondents TCNICU and Tarrant County's Motion for a Protective Order and denied Petitioners' request for a hearing on that motion. (R.II,453). On January 22, 1991, barely three weeks later, the District Court granted Respondents TCNICU and Tarrant County's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that Petitioners' First Amended Complaint did not satisfy the Fifth Circuit's "heightened pleading" requirement. In the alternative, the District Court granted Respondents TCNICU and Tarrant County's motion for summary judgment, and thereafter sua sponte dismissed and granted summary judgment in favor of Respondents City of Grapevine and City of Lake Worth with respect to the remainder of the Petitioners' claims. (R.II, 457).

On appeal, the United States Court of Appeals for the Fifth Circuit, in a majority opinion written by the Honorable Irving L. Goldberg, affirmed. Pet. App. at page 2a, 954 F.2d at 1055. The majority opinion for the Court of Appeals rested its decision to affirm solely on

the ground that the Petitioners' First Amended Complaint had failed to satisfy the Fifth Circuit's "heightened pleading" requirement. See Pet. App. at page 14a n.6, 954 F.2d at 1058 n.6.

In a specially concurring opinion, also written by him, Judge Goldberg noted that he was "impressed by the wealth of authority plaintiffs cite in support of their position" challenging the heightened pleading requirement, Pet. App. at page 23a-24a, 954 F.2d at 1061, but noted further that, in light of preexisting Fifth Circuit precedent, he found himself "constrained to obey the command of the heightened pleading requirement" in the Petitioners' case. Ibid.

Following the decision of the Court of Appeals rendered February 28, 1992, the Petitioners on April 16, 1992, filed a Petition for Writ of Certiorari. This Court granted the Petition on June 22, 1992.

SUMMARY OF THE ARGUMENT

1. The "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957). In this case, imposition of such a

requirement, which requires plaintiffs in civil rights cases to allege with particularity the evidentiary support for their claims prior to discovery, cannot be justified on the basis of an individual governmental defendant's assertion of the affirmative defense of qualified immunity under 42 U.S.C. Section 1983. The Respondents in the present case are all local governmental entities which, under this Court's decision in Owen v. City of Independence, Mo., 455 U.S. 622 (1980), cannot rely on an absolute or qualified immunity defense.

2. To the extent Federal Rule of Civil Procedure 8(a)(2) can be construed to require greater factual specificity for a plaintiff's allegations depending on "the nature of the claim" presented, Rule 8(a)(2) violates that part of the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that the Congressional delegation of rulemaking authority to the Supreme Court does not include the power to adopt rules that "abridge, enlarge or modify any substantive right." By imposing solely upon plaintiffs bringing suit under 42 U.S.C. Section 1983 the burden of pleading evidence to support their claims prior to discovery, the heightened

pleading requirement effectively nullifies, and thereby "abridges," the remedial right provided under Section 1983 when evidence necessary to satisfy the heightened pleading requirement remains in the exclusive possession of a defendant. The heightened pleading requirement also confers upon local governmental defendants sued under Section 1983 the functional equivalent of a substantive qualified immunity from discovery. In this latter sense, the heightened pleading requirement impermissibly "enlarges" a local governmental entity defendant's substantive rights at the expense of the plaintiff.

ARGUMENT

I

DISMISSAL OF PETITIONERS' FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, DUE TO THE COMPLAINT'S FAILURE TO SATISFY A "HEIGHTENED PLEADING" REQUIREMENT, IS PROHIBITED BY THE FEDERAL RULES OF CIVIL PROCEDURE.

Dismissal of a complaint for failure to state a claim upon which relief can be granted, due to an alleged failure "to set forth specific facts," is governed by Rule

8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957). In Conley the respondents argued, like the Respondents in the instant case have successfully argued below, that the complaint they challenged "failed to set forth specific facts to support its general allegations." Id., 355 U.S. at 47. The Supreme Court rejected this challenge in Conley with the following holding:

> "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' [quoting Rule 8(a)(2)] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id., 355 U.S. at 47.

While it remains unclear upon what authority the lower Courts have relied to depart from the rule announced in Conley and impose a requirement that civil rights plaintiffs plead specific factual detail in support of their claims, in the Fifth Circuit two rationales have been advanced to support this departure: first, that a need for specific factual detail in

a civil rights complaint is necessary in order to avoid "frustration of the protections and policies underlying the [qualified] immunity doctrine," Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985); and second, that "what is short and plain [under Rule 8(a)(2)] has no universal meaning independent of the nature of a claim," Elliott, supra, 751 F.2d at 1483 (Higginbotham, J., concurring).

The first justification for a heightened pleading requirement noted above, i.e., to avoid interference with a public official's qualified immunity from suit, does not apply in cases such as the present one where only a governmental entity is the named defendant. Under Section 1983, local governmental entities are not entitled to assert either an absolute or qualified immunity from suit. See Owen v. City of Independence, Mo., 445 U.S. 622 (1980).

To the extent it may be argued that what is "short and plain" under Rule 8(a)(2) depends on the nature of a claim, such an argument conflicts with both the plain meaning of the Federal Rules as well as the legislative history of the rules. Federal courts are obliged to "give the Federal Rules of Civil Procedure their plain meaning," Pavelic & LeFlore v. Marvel Entertainment

Group, 493 U.S. 120, 123 (1989), and "to apply the text, not to improve upon it." Id., 493 U.S. at 126. Neither Rule 8(a)(2), nor the term "short and plain," manifest any intent on the part of the drafters of the Federal Rules of Civil Procedure to require varying requirements of factual particularity in pleadings depending on the "nature of the claim."

Moreover, any assumption that greater specificity was intended under the rules depending on the particular "nature of a claim" is also refuted by the fact that when the drafters wanted to require greater specificity in pleading, they knew how to do it. Rule 9(b) of the Federal Rules of Civil Procedure expressly requires greater factual specificity only for claims alleging fraud or mistake. By negative implication, it is therefore clear that neither the Advisory Committee, the Supreme Court, nor Congress intended to require that civil rights plaintiffs plead their claims with greater factual particularity than other claimants generally.[4]

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[4]Rule 9(b) also provides that "[m]alice intent, knowledge and other condition of mind of a person may be averred generally." This part of Rule 9(b) would seem directly applicable to allegations of "deliberate indifference" such as alleged in this case.

There are also several serious "pragmatic and theoretical difficulties with the heightened pleading requirement," Schwartz and Kirklin, Section 1983 Litigation: Claims, Defenses and Fees, Vol. I, Section 1.6, at page 20 (1991), particularly where evidence needed to be pled in order to satisfy the heightened pleading requirement rests in the exclusive possession of a defendant. While Rule 56(f) of the Federal Rules of Civil Procedure permits discovery to proceed when a plaintiff cannot fairly be expected to present facts essential to support his claim, the heightened pleading requirement does not, and neither the federal rules nor local state law generally permit discovery, prior to commencing suit, in order to secure evidentiary support for a plaintiff's claim. See C. Wright & A. Miller, Federal Practice and Procedure: Civil, Section 2071 (1969), at pages 332-33 (discussing limitations on prefiling discovery under Fed. R. Civ. P. 27(a)); and e.g., the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. Article 6252-17a, section 3(a)(3) (Vernon Supp. 1992) (exempting from disclosure "information relating to litigation...to which the state or political subdivision...[or] an officer or employee of the state or

political subdivision, as a consequence of his office or employment, is or may be a party....").

The Reporter of the Supreme Court's Committee on the Rules of Civil Procedure which drafted Rule 8, later sitting as an appellate judge, has confirmed in a decision cited favorably by the Supreme Court in Conley v. Gibson, 335 U.S. at 46 n.5, that "there is no pleading requirement [under the Federal Rules of Civil Procedure] of 'stating facts sufficient to constitute a cause of action.'" Dioguardi v. Durning, 139 F.2d 774, 775 (2nd Cir. 1944) (Opinion per Charles E. Clark, J.). In keeping with this understanding of the federal rules, the Supreme Court has applied the "notice pleading" standard adopted in Conley v. Gibson, 355 U.S. 41 (1957) to claims alleging municipal liability under 42 U.S.C. Section 1983. In Brower v. County of Inyo, 489 U.S. 593, 598 (1989), the Supreme Court held that Section 1983 plaintiffs had adequately pled a claim against a local governmental entity. The Court did so, moreover, despite the fact that, as the Court of Appeals in Brower noted, the plaintiffs' first amended complaint contained "little more than bare conclusions." Id., 817 F.2d 540, 544 (9th Cir. 1987). For the Supreme Court

to have held that the Brower first amended complaint adequately stated a claim is not remarkable once it is understood that consideration of a Rule 12(b) motion, unlike a Rule 56 motion, requires a "presum[ption] that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. National Wildlife Federation, 497 U.S. ___, 110 S.Ct. 3177, 3189 (1990).

II

DISMISSAL OF PETITIONERS' FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, DUE TO THE COMPLAINT'S FAILURE TO SATISFY A "HEIGHTENED PLEADING" REQUIREMENT, IS PROHIBITED BY THE RULES ENABLING ACT, 28 U.S.C. SECTION 2072(b), WHICH PROVIDES THAT RULES OF PRACTICE AND PROCEDURE SHALL NOT ABRIDGE, ENLARGE OR MODIFY ANY SUBSTANTIVE RIGHT.

Should the Supreme Court conclude that Rule 8(a)(2) of the Federal Rules of Civil Procedure authorizes selective application of a "heightened pleading" requirement to certain cases depending on the "nature of the claim," the Court must then consider whether Rule 8(a)(2), as so applied, violates that part of the

Rules Enabling Act, 28 U.S.C. Section 2072 (b), which provides that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right." Consideration of the Act and its pre-1934 legislative history compels the conclusion that Rule 8(a)(2), to the extent it authorizes any disparity in treatment between civil rights cases and all other cases, is invalid.

As Professor Stephen B. Burbank has noted in his comprehensive article, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982), the Rules Enabling Act since its enactment has contained a "procedure/ substance dichotomy" in its delegation of rulemaking authority. Id., at 1106. On the one hand, Congress has delegated rulemaking authority to the Supreme Court "to prescribe general rules of practice and procedure...in the United States District Courts," 28 U.S.C. Section 2072(a), but at the same time has directed that rules promulgated under the Act "shall not abridge, enlarge or modify any substantive right." Id., Section 2072(b). The latter provision, which has been construed by the Supreme Court as manifesting an intent by Congress to withhold rulemaking power to "'abridge, enlarge or modify substantive rights' in the guise of regulating

procedure," Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941), expresses a Congressional decision "to allocate policy choices---to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights."[5] It is evident that the "heightened pleading" requirement made applicable only to civil rights cases, insofar as it may be a part of Rule 8(a)(2), contravenes the Congressional allocation of policymaking choices intended by the procedure/ substance dichotomy contained in the Rules Enabling Act.

By design, the "heightened pleading" requirement does not merely "incidentally affect [a civil rights] litigant's substantive rights" in a manner that is "reasonably necessary to maintain the integrity" of federal practice and procedure. Burlington Northern R. Co. v. Woods, 480 U.S. 1, 5 (1987) (considering challenge based on Rules Enabling Act). Rather, it imposes a burden on civil rights plaintiffs that is impossible to meet, and thus impermissibly "add[s]

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[5]Burbank, The Rules Enabling Act of 1934, supra, 130 U. Pa. L. Rev. at 1113.

requirements to burden the private litigant beyond what is specifically set forth by Congress." Radovich v. National Football League, 352 U.S. 445, 454 (1957) (rejecting "technical objections" to sufficiency of Sherman Act complaint). In cases such as the instant one, where the theory of respondent superior does not apply, civil rights claimants who have sued local governmental entities may by required to establish that an individual police officer has violated their constitutional rights as a result of the "deliberate indifference" of an official policymaker or in accordance with a preexisting "persistent, widespread custom or practice" of the local governmental entity itself. Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc). The "heightened pleading" requirement, as applied to claims against local governmental entities prior to discovery, imposes an impossible burden on a plaintiff where, as here, the evidence necessary to allege with specificity this element of his claim is in the exclusive hands of the defendant governmental entity. As one Court has noted:

> "We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, i.e., that there was an official policy or de facto custom which violated the Constitution." Means v. City of Chicago, 535 F.Supp. 455, 460 (N.D. Ill. 1982)

Nor does the decisional development of the heightened pleading requirement reflect that it is motivated substantially by a neutral concern for procedural, as opposed to substantive, matters. For example, in Valley v. Maule, 297 F.Supp. 958 (D.Conn 1968), a case referred to by one commentator as "[t]he first case to announce a special pleading rule for civil rights cases,"[6] the court provided the following rationale for its selective imposition of the heightened pleading requirement:

> "In recent years there has been an increasingly large volume of cases brought under the civil rights act. A substantial number of these cases are frivolous or

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[6] Wingate, A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?, 49 Mo. L. Rev. 677, 683 (1984).

> should be litigated in the State courts; they all cause defendants---public officials, policemen and citizens alike--considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims." Id., 297 F.Supp. at 960-61.

While it certainly is "an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation," ibid., the fact that there is "an increasingly large volume of cases brought under the civil rights act" does not justify, without affirmative Congressional action, adoption of a procedural rule designed to effectively abolish or nullify a statutory remedy involving important federal rights. The requirement in Rule 11 of the Federal Rules of Civil Procedure that an attorney or party who signs a pleading certify that the pleading is "to the best of the signer's knowledge...well grounded in fact," together with the availability of appropriate sanctions including the payment of attorney's fees for violation of the certification requirement, provides adequate protection

to those persons who might be subjected to "frivolous" or "vexatious" claims.

Moreover, except in those infrequent cases in which a plaintiff's claims can fairly be said to describe "fantastic or delusional scenarios," Denton v. Hernandez, 504 U.S. ____, 112 S.Ct.1728, 1733 (1992), quoting Nietzke v. Williams, 490 U.S. 319, 328 (1989), dismissal of a case for failure to satisfy a heightened pleading requirement does not provide a reliable means of distinguishing between "frivolous" and "legitimate" claims. At the pleading stage, a judge "must guess whether the plaintiff, if allowed discovery, will be able to gather evidence to support his claims. Uninformed judicial speculation is not an adequate means of arriving at correct decisions on the merits." Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 483 (1986). To the extent Rule 8(a)(2) authorizes such judicial speculation when applying the heightened pleading requirement, it impermissibly abridges and modifies the substantive rights of civil rights litigants "in the guise of regulating procedure." Sibbach v. Wilson & Co., supra, 312 U.S. at 10.

Extending the functional equivalent of a qualified immunity defense to local governmental entities through adoption of a heightened pleading requirement in order to eliminate pretrial discovery likewise operates to impermissibly "enlarge" the substantive rights of the local governmental entity defendant. Recognition of the "substantive" defense of qualified immunity, as applied to state officials sued in their individual capacities, rests on a conclusion that under certain circumstances "the Congress that enacted the 1871 Civil Rights Act did not intend to subject them to damages liability." Mitchell v. Forsyth, 472 U.S. 511, 538 (1985) (Stevens, J., concurring). As Petitioners have noted, supra at page 17, qualified immunity is not a substantive defense available to governmental entities, and therefore cannot serve as a basis for imposing the heightened pleading requirement to claims alleging liability against local governmental entities. Assuming arguendo that imposition of the heightened pleading requirement in cases in which a qualified immunity defense may properly be raised is necessary to recognize the substantive remedial scope of Section 1983 and avoid violation of the Rules Enabling Act, 28 U.S.C. Section

2072, [7] the same cannot be said with regard to claims brought against local governmental entities. In the latter context application of the heightened pleading requirement when no substantive qualified immunity defense exists "abridges" the substantive remedial rights provided to the plaintiff by Section 1983.

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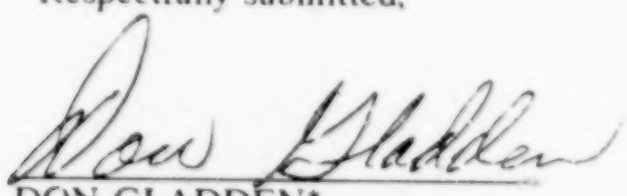
[7]Such an argument was made by the Acting Solicitor General in his brief for the respondent in Siegart v. Gilley, 500 U.S. ___, 111 S.Ct. 1789 (1991), at page 25.

CONCLUSION

For the foregoing reasons, Petitioners pray that the February 28, 1992 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit will be reversed and this case remanded for further proceedings.

Respectfully submitted,



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